

DANIEL M. PETROCELLI (S.B. #97802)  
 dpetrocelli@omm.com  
 MOLLY M. LENS (S.B. #283867)  
 mlens@omm.com  
 CAMERON H. BISCAY (S.B. #266786)  
 cbiscay@omm.com  
 O'MELVENY & MYERS LLP  
 1999 Avenue of the Stars, 7th Floor  
 Los Angeles, California 90067-6035  
 Telephone: (310) 553-6700  
 Facsimile: (310) 246-6779

Attorneys for Twentieth Century Fox  
 Television, a division of Twentieth Century  
 Fox Film Corporation, and Fox Broadcasting  
 Company

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**WESTERN DIVISION**

TWENTIETH CENTURY FOX  
 TELEVISION, a division of  
 TWENTIETH CENTURY FOX FILM  
 CORPORATION, a Delaware company,  
 et al.,

Plaintiffs,

v.

EMPIRE DISTRIBUTION, INC., a  
 California corporation,

Defendant.

Case No. 2:15-cv-02158 PA(FFMx)

**FOX'S MEMORANDUM OF  
 EVIDENTIARY OBJECTIONS TO  
 EVIDENCE CITED BY  
 DEFENDANT IN OPPOSITION  
 TO MOTION FOR SUMMARY  
 JUDGMENT**

**Judge:** Hon. Percy Anderson

**Hearing Date:** February 1, 2016

**Time:** 1:30 p.m.

**Place:** Courtroom 15

And related counterclaims

1 In support of its Reply Memorandum In Support Of Fox's Notice Of Motion  
 2 And Motion For Summary Judgment, plaintiffs and counterclaim defendants  
 3 Twentieth Century Fox Television, a division of Twentieth Century Fox Film  
 4 Corporation, and Fox Broadcasting Company (collectively, "Fox") submit the  
 5 following Memorandum Of Evidentiary Objections To Evidence Cited By  
 6 Defendant In Opposition To Motion For Summary Judgment:

7  
 8 **Objections To Defendant's Evidence Contesting Fox's Uncontroverted Facts**

9  
 10 **Fox's Paragraph 1:**

11 (1) Objection to season 1 DVD of *Empire*, lodged with the Court as Ex. 11 to  
 12 Lens Decl., Pilot at 33:16-23 ("You're so pure only a couple hundred white kids in  
 13 Brooklyn and San Francisco even know your stuff.") on the basis that this statement  
 14 does not speak to the setting of *Empire* and thus is irrelevant to the Court's analysis  
 15 of the artistic relevance of the title "Empire" to the show under Fox's First  
 16 Amendment defense. FRE 401.

17 (2) Objection to Ryan Decl. ¶ 6 on the basis that these logos do not speak to  
 18 the name of the fictional company in *Empire*. These are real-life logos for the  
 19 *Empire* television series and its soundtrack. They are not fictional logos of the  
 20 fictional company in the series, and thus are irrelevant to the Court's analysis of the  
 21 artistic relevance of the title "Empire" to the show under Fox's First Amendment  
 22 defense. FRE 401.

23 (3) Objection to Bowler Decl. ¶ 4, Ex. 69, 48:22-25, 49:3-5, 71:22-24, 72:5-  
 24 7, 72:9-10, 72:14, 72:24-73:13, 73:16-18, 73:23-74:17, 75:18-24, 83:25-84:7,  
 25 84:11-21; 89:10-25, 90:1, 90:8-14, 91:2-3, 91:6-7, 91:10-17, 92:4-7, 92:10-19;  
 26 93:1-11; Bywater Exs. 6, 7, on the basis that Mr. Bywater's testimony and the  
 27 related exhibits about Fox's efforts to make the fictional world of *Empire* seem  
 28

1 realistic do not suggest that *Empire* is based on real individuals or events and thus  
 2 are not relevant to whether Empire Enterprises is a fictional company. FRE 401.

3  
 4 **Fox's Paragraph 3:**

5 (1) Objection to season 1 DVD of *Empire*, lodged with the Court as Ex. 11 to  
 6 Lens Decl., Pilot at 6:31-39, 45:16-25, 7:15-20, 9:20-22, 27:32-34, 45:55, signage,  
 7 symbols, and labels reflecting the name "Empire," 33:16-33:23, on the basis that  
 8 these scenes dealing with the name of the fictional company (and one with the  
 9 quote, "You're so pure only a couple hundred white kids in Brooklyn and San  
 10 Francisco even know your stuff.") do not speak to the wide-reaching and diverse  
 11 business activities of the fictional company and thus are irrelevant to the Court's  
 12 analysis of the artistic relevance of the title "Empire" to the show under Fox's First  
 13 Amendment defense. FRE 401.

14 (2) Objection to Ryan Decl. ¶ 6 on the basis that these logos do not speak to  
 15 the wide-reaching and diverse business activities of the fictional company and thus  
 16 are irrelevant to the Court's analysis of the artistic relevance of the title "Empire" to  
 17 the show under Fox's First Amendment defense. FRE 401.

18 (3) Objection to Bowler Decl. ¶ 4, Ex. 69, 48:22-25, 49:3-5, 71:22-24, 72:5-  
 19 7, 72:9-10, 72:14, 72:24-73:13, 73:16-18, 73:23-74:17, 75:18-24, 83:25-84:7,  
 20 84:11-21; 89:10-25, 90:1, 90:8-14, 91:2-3, 91:6-7, 91:10-17, 92:4-7, 92:10-19;  
 21 93:1-11; Bywater Exs. 6, 7, on the basis that Mr. Bywater's testimony and related  
 22 exhibits about Fox's efforts to make the fictional word seem realistic do not speak  
 23 to the wide-reaching and diverse business activities of the fictional company and  
 24 thus are irrelevant to the Court's analysis of the artistic relevance of the title  
 25 "Empire" to the show under Fox's First Amendment defense. FRE 401.

**Fox's Paragraph 7:**

(1) Objection to Shami Decl. ¶¶ 84, 92-94, 100, 114 on the basis that Mr. Shami's testimony, which largely describes consumers' purported views, does not speak to representations about endorsement or affiliation made or not made by Fox and thus is irrelevant to the Court's analysis of whether Fox explicitly misled consumers as to defendant's endorsement or affiliation under Fox's First Amendment defense. FRE 401.

(2) Further objection to Shami Decl. ¶¶ 92-94, 100, 114 on the basis that Mr. Shami's testimony contains improper opinion testimony from a lay witness about (a) what consumers do or "will" think or believe and why, and (b) purported business or reputational harm. FRE 701. Mr. Shami was not designated as an expert witness by defendant, yet he impermissibly provides opinion about consumer behavior and potential harm to one's business or reputation, areas of specialized knowledge that Mr. Shami does not purport to have. *Munchkin, Inc. v. Luv N' Care, Ltd.*, 2015 WL 774046, at \*3 (C.D. Cal. Feb. 24, 2015) ("Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.") (quoting *United States v. Connecticut*, 297 F.3d 548, 554 (7th Cir. 2002)).

(3) Further objection to Shami Decl. ¶¶ 92-94, 100, 114 on the basis that it contains impermissible legal conclusions about consumer confusion and harm to defendant and its reputation. FRE 701.

(4) Further objection to Shami Decl. ¶¶ 92-94, 100 (citing Ex. 7) on the basis that it is speculative, describing what consumers "will" think, describing thoughts and intentions behind Twitter users' tweets, describing hypothetical storylines on *Empire*, and speculating as to the harm defendant might face.

(5) Further objection to Shami Decl. ¶¶ 92-94, 100 (citing Ex. 7), 114 on the basis that Mr. Shami lacks personal knowledge of these purported facts. FRE 602.

1 Mr. Shami does not know what consumers do or might think, and he does not know  
2 what a Twitter user thinks when posting a tweet.

3 (6) Objection to Simon Decl. ¶¶ 2-3 on the basis that Mr. Simon's testimony,  
4 describing individuals who purportedly asked about or believed that *Empire* was  
5 about defendant, does not speak to representations about endorsement or affiliation  
6 made or not made by Fox and thus is irrelevant to the Court's analysis of whether  
7 Fox explicitly misled consumers as to defendant's endorsement or affiliation under  
8 Fox's First Amendment defense. FRE 401.

9 (7) Objection to Bowler Decl. ¶ 8, Ex. 73 (Expert Report of Kristin J. Lieb)  
10 ¶¶ 3, 34-45, 48 on the basis that the purported expert opinion relies entirely on  
11 unreliable hearsay statements. FRE 703; *Marcel v. Placid Oil Co.*, 11 F.3d 563,  
12 567 n.6 (5th Cir.1994) (Experts may rely on hearsay "if the data is reliable and  
13 qualified under Rule 703."); *Soden v. Freightliner Corp.*, 714 F.2d 498, 503-06 (5th  
14 Cir. 1983).

15 (8) Objection to McDaniels Decl. ¶¶ 15-17 on the basis that Mr. McDaniels'  
16 testimony, purporting to describe his views, does not speak to representations about  
17 endorsement or affiliation made or not made by Fox and thus is irrelevant to the  
18 Court's analysis of whether Fox explicitly misled consumers as to defendant's  
19 endorsement or affiliation under Fox's First Amendment defense. FRE 401.

20 (9) Further objection to McDaniels Decl. ¶¶ 15-17 on the basis that it  
21 contains improper opinion testimony from a lay witness about likelihood of  
22 confusion and similarities between defendant and *Empire*. FRE 701. Mr.  
23 McDaniels was not designated as an expert witness by defendant, yet he  
24 impermissibly provides opinions based on his purported specialized knowledge and  
25 experience. *See United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir.  
26 1997) (opinions based on "perceptions, education, training, and experience of the  
27 witness" are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion  
28 testimony is not to provide specialized explanations or interpretations that an

1 untrained layman could not make if perceiving the same acts or events.”) (quoting  
2 *Connecticut*, 297 F.3d at 554).

3 (10) Further objection to McDaniels Decl. ¶¶ 15-17 on the basis that it  
4 contains impermissible legal conclusions about likelihood of consumer confusion.  
5 FRE 701.

6 (11) Objection to Douthit Decl. ¶ 14 on the basis that Mr. Douthit’s  
7 testimony, relating to how names and hashtags have purportedly damaged  
8 defendant, does not speak to representations about endorsement or affiliation made  
9 or not made by Fox and thus is irrelevant to the Court’s analysis of whether Fox  
10 explicitly misled consumers as to defendant’s endorsement or affiliation under  
11 Fox’s First Amendment defense. FRE 401.

12 (12) Further objection to Douthit Decl. ¶ 14 on the basis that Mr. Douthit’s  
13 testimony contains improper opinion testimony from a lay witness about purported  
14 mistaken association between defendant and *Empire* and the alleged damage it  
15 causes defendant. FRE 701. Mr. Douthit was not designated as an expert witness  
16 by defendant, yet he impermissibly provides opinions based on his purported  
17 specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246  
18 (opinions based on “perceptions, education, training, and experience of the witness”  
19 are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 (“Lay opinion testimony is  
20 not to provide specialized explanations or interpretations that an untrained layman  
21 could not make if perceiving the same acts or events.”) (quoting *Connecticut*, 297  
22 F.3d at 554).

23 (13) Further objection to Douthit Decl. ¶ 14 on the basis that it contains  
24 impermissible legal conclusions about confusion and damage to defendant. FRE  
25 701.

26 (14) Objection to Julien Decl. ¶¶ 22-26 on the basis that Ms. Julien’s  
27 testimony, relating how confusion may occur and damage may result at events  
28 where both parties are present, does not speak to representations about endorsement

1 or affiliation made or not made by Fox and thus is irrelevant to the Court's analysis  
 2 of whether Fox explicitly misled consumers as to defendant's endorsement or  
 3 affiliation under Fox's First Amendment defense. FRE 401.

4 (15) Further objection to Julien Decl. ¶¶ 22-26 on the basis that Ms. Julien's  
 5 testimony contains improper opinion testimony from a lay witness about potential  
 6 confusion at industry events and resulting damage. FRE 701. Ms. Julien was not  
 7 designated as an expert witness by defendant, yet she impermissibly provides  
 8 opinions based on her purported specialized knowledge and experience. *See*  
 9 *Figueroa-Lopez*, 125 F.3d at 1246 (9th Cir. 1997) (opinions based on "perceptions,  
 10 education, training, and experience of the witness" are expert opinions); *Munchkin*,  
 11 2015 WL 774046, at \*3 ("Lay opinion testimony is not to provide specialized  
 12 explanations or interpretations that an untrained layman could not make if  
 13 perceiving the same acts or events.") (quoting *Connecticut*, 297 F.3d at 554).

14 (16) Further objection to Julien Decl. ¶¶ 22-26 on the basis that it contains  
 15 impermissible legal conclusions about confusion and damage to defendant. FRE  
 16 701.

17 (17) Further objection to Julien Decl. ¶¶ 22-26 on the basis that it is  
 18 speculative, describing that *Empire* "may hurt" defendant, speculating why  
 19 Kendrick Lamar became successful, and speculating that it is "*likely* that other  
 20 professionals who value honesty like I do will never give themselves the chance to  
 21 work with [defendant]." (emphasis added).

22 (18) Further objection to Julien Decl. ¶¶ 22-26 on the basis that Ms. Julien  
 23 lacks personal knowledge of these purported facts. FRE 602. Ms. Julien does not  
 24 know how professionals react to the fictional storylines in *Empire*.

## 25 **Fox's Fact 9:**

26 (1) Objection to Shami Decl. ¶¶ 136-41 on the basis that Mr. Shami's  
 27 testimony about appearances on television shows, the production of music videos  
 28



1 that have appeared on non-broadcast television networks, and plans to have artist  
 2 appearances and advertising on television is irrelevant to the fact that defendant  
 3 does not allege in its Counterclaims that it produces broadcast television  
 4 programming or that it intends to expand into broadcast television programming.  
 5 FRE 401.

6 (2) Further objection to Shami Decl. ¶¶ 136-41 on the basis that Mr. Shami's  
 7 testimony that defendant's music goods and services lend themselves naturally to  
 8 television, and that *Empire* threatens defendant's purported presence on television,  
 9 contains improper opinion testimony from a lay witness about the television  
 10 industry and potential harm to defendant. FRE 701. Mr. Shami was not designated  
 11 as an expert witness by defendant, yet he impermissibly provides opinions about  
 12 the television industry, an area of specialized knowledge Mr. Shami does not  
 13 purport to have. *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion testimony is not  
 14 to provide specialized explanations or interpretations that an untrained layman  
 15 could not make if perceiving the same acts or events.") (quoting *Connecticut*, 297  
 16 F.3d at 554).

17 (3) Further objection to Shami Decl. ¶¶ 136-41 on the basis that Mr. Shami's  
 18 testimony contains impermissible legal conclusions about damage to defendant.  
 19 FRE 701.

20  
 21 **Fox's Fact 10:**

22 (1) Objection to Hobbs Decl. ¶¶ 4-5 on the basis that Mr. Hobbs' testimony  
 23 about defendant's purported use of marks and defendant's purported common law  
 24 trademarks is irrelevant to the fact that none of defendant's marks is federally  
 25 registered. FRE 401.

26 (2) Further objection to Hobbs Decl. ¶¶ 4-5 on the basis that Mr. Hobbs lacks  
 27 personal knowledge of the nature and extent of Empire Distribution's use of its  
 28 purported marks since January 2010. FRE 602.



(3) Further objection to Hobbs Decl. ¶ 5 on the basis that it contains an impermissible legal conclusion as to Empire Distribution's trademark rights. FRE 701.

**Fox's Fact 16:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69 at 32:32-33:10, 33:14-15, 33:21-34:5, on the basis that Mr. Bywater's testimony about merchandising (e.g., hats or swag for promotional events) is irrelevant to whether Columbia Records acts as the record label for the *Empire* soundtrack music and distributes *Empire*'s original songs. FRE 401.

(2) Objection to Bowler Decl. ¶ 4, Ex. 69 at 34:9-10, 34:13-14, 34:16-22, on the basis that the similarities between *Glee* and *Empire* are not relevant to whether Columbia Records acts as the record label for the *Empire* soundtrack music and distributes *Empire*'s original songs. FRE 401.

(3) Objection to Bowler Decl. ¶ 4, Ex. 69, 163:1-3, 163:10-164:1, 164:5-7, 164:11-164:24, 165:15-16, 165:19-21, 167:3-4, 167:7, on the basis that the number of sales, downloads, and streams of the *Empire* soundtrack is irrelevant to whether Columbia Records acts as the record label for the *Empire* soundtrack music and distributes *Empire*'s original songs. FRE 401.

(4) Objection to Bowler Decl. ¶ 4, Ex. 69, 208:3-6 209:15-24, 210:4-5, 210:8-14, and Bywater Ex. 30 on the basis that Mr. Bywater lacks personal knowledge of the intended meaning of Mr. Melnick's statements. FRE 602. Further objection to Mr. Melnick's statements in Bywater Ex. 30 on the basis that they are out of court statements offered to prove the truth of the matter asserted and thus constitute impermissible hearsay not subject to any exception. FRE 801.

(5) Objection to Bowler Decl. ¶ 4, Ex. 69 (Exs. 3, 4 to Bywater Tr.) on the basis these pieces of evidence are out of court statements offered to prove the truth

1 of the matter asserted and thus constitute impermissible hearsay not subject to any  
2 exception. FRE 801.

3  
4 **Fox's Fact 29:**

5 (1) Objection to Defendant's Counterclaims, Lens Decl., Ex. 4 ¶¶ 9, 10, 14,  
6 15, 16, and 18, on the basis that vague allegations of broad advertising and  
7 advertising at events are irrelevant to the fact that defendant has not alleged in its  
8 Counterclaims that it advertises its marks on television, billboards, or print media.  
9 FRE 401.

10  
11 **Fox's Fact 34:**

12 (1) Objection to Defendant's Counterclaims, Lens Decl., Ex. 4 at p. 55 ¶ 23,  
13 on the basis that the image of a Google search result is irrelevant to the fact that  
14 screenshots of *albums* in Paragraph 23 of defendant's Counterclaims do not show  
15 defendant's marks, and that defendant highlighted the albums it released. FRE 401.

16  
17 **Fox's Fact 39:**

18 (1) Objection to Bowler Decl. ¶ 8, Ex. 73 (Expert Report of Kristin J. Lieb),  
19 including ¶¶ 3, 34-45, 48 on the basis that the purported expert opinion relies  
20 entirely on unreliable hearsay statements. FRE 703; *Marcel*, 11 F.3d at 567 n.6  
21 (Experts may rely on hearsay "if the data is reliable and qualified under Rule  
22 703."); *Soden*, 714 F.2d at 503-06.

23 (2) Objection to Bowler Decl. ¶ 7, Ex. 72 (Expert Report of Dr. Joel H.  
24 Steckel) at p. 9, ¶ 21, on the basis that Dr. Steckel's comments about Mr. Johnson's  
25 expert report are irrelevant to Dr. Jay's expert report. FRE 401.

26 (3) Objection to Bowler Decl. ¶¶ 7-8, Exs. 72-73, on the basis that the  
27 purported expert reports, when cited as a whole, contain information irrelevant to  
28 Dr. Jay's expert report. FRE 401. Further objection that this wholesale citation of

1 purported expert reports that do not support or controvert this proposed statement of  
2 undisputed fact violates the Court's Scheduling Order. Dkt. 23 at 4:12-17.

3 (4) Objection to McDaniels Decl. ¶¶ 15-17 on the basis that it contains  
4 improper opinion testimony from a lay witness about likelihood of confusion and  
5 similarities between defendant and *Empire*. FRE 701. Mr. McDaniels was not  
6 designated as an expert witness by defendant, yet he impermissibly provides  
7 opinions based on his purported specialized knowledge and experience. *See*  
8 *Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on "perceptions, education,  
9 training, and experience of the witness" are expert opinions); *Munchkin*, 2015 WL  
10 774046, at \*3 ("Lay opinion testimony is not to provide specialized explanations or  
11 interpretations that an untrained layman could not make if perceiving the same acts  
12 or events.") (quoting *Connecticut*, 297 F.3d at 554).

13 (5) Further objection to McDaniels Decl. ¶¶ 15-17 on the basis that it  
14 contains impermissible legal conclusions about likelihood of consumer confusion.  
15 FRE 701.

16 (6) Objection to Douthit Decl. ¶ 14 on the basis that Mr. Douthit's testimony  
17 contains improper opinion testimony from a lay witness about purported mistaken  
18 association between defendant and *Empire* and the alleged damage it causes  
19 defendant. FRE 701. Mr. Douthit was not designated as an expert witness by  
20 defendant, yet he impermissibly provides opinions based on his purported  
21 specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246  
22 (opinions based on "perceptions, education, training, and experience of the witness"  
23 are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion testimony is  
24 not to provide specialized explanations or interpretations that an untrained layman  
25 could not make if perceiving the same acts or events.") (quoting *Connecticut*, 297  
26 F.3d at 554).

1 (7) Further objection to Douthit Decl. ¶ 14 on the basis that it contains  
 2 impermissible legal conclusions about confusion and damage to defendant. FRE  
 3 701.

4 (8) Objection to Julien Decl. ¶¶ 22-26 on the basis that Ms. Julien's  
 5 testimony contains improper opinion testimony from a lay witness about potential  
 6 confusion and resulting damage. FRE 701. Ms. Julien was not designated as an  
 7 expert witness by defendant, yet she impermissibly provides opinions based on her  
 8 purported specialized knowledge and experience. See *Figueroa-Lopez*, 125 F.3d at  
 9 1246 (opinions based on "perceptions, education, training, and experience of the  
 10 witness" are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion  
 11 testimony is not to provide specialized explanations or interpretations that an  
 12 untrained layman could not make if perceiving the same acts or events.") (quoting  
 13 *Connecticut*, 297 F.3d at 554).

14 (9) Further objection to Julien Decl. ¶¶ 22-26 on the basis that it contains  
 15 impermissible legal conclusions about confusion and damage to defendant. FRE  
 16 701.

17 (10) Further objection to Julien Decl. ¶¶ 22-26 on the basis that it is  
 18 speculative, describing that *Empire* "may hurt" defendant, speculating why  
 19 Kendrick Lamar became successful, and speculating that it is "*likely* that other  
 20 professionals who value honesty like I do will never give themselves the chance to  
 21 work with [defendant]." (emphasis added).

22 (11) Further objection to Julien Decl. ¶¶ 22-26 on the basis that Ms. Julien  
 23 lacks personal knowledge of these purported facts. FRE 602. Ms. Julien does not  
 24 know how professionals react to the fictional storylines in *Empire*.

25 (12) Objection to Shami Decl. ¶¶ 92-94, 100, 114 on the basis that Mr.  
 26 Shami's testimony contains improper opinion testimony from a lay witness about  
 27 (a) what consumers do or "will" think or believe and why, and (b) purported  
 28 business or reputational harm. FRE 701. Mr. Shami was not designated as an

expert witness by defendant, yet he impermissibly provides opinion about consumer behavior and potential harm to one's business or reputation, areas of specialized knowledge that Mr. Shami does not purport to have. *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.") (quoting *Connecticut*, 297 F.3d at 554).

(13) Further objection to Shami Decl. ¶¶ 92-94, 100, 114 on the basis that it contains impermissible legal conclusions about consumer confusion and harm to defendant and its reputation. FRE 701.

(14) Further objection to Shami Decl. ¶¶ 92-94, 100 (citing Ex. 7) on the basis that it is speculative, describing what consumers "will" think, describing thoughts and intentions behind Twitter users' tweets, describing hypothetical storylines on *Empire*, and speculating as to the harm defendant might face.

(15) Further objection to Shami Decl. ¶¶ 92-94, 100 (citing Ex. 7), 114 on the basis that Mr. Shami lacks personal knowledge of these purported facts. FRE 602. Mr. Shami does not know what consumers do or might think, and he does not know what a Twitter user thinks when posting a tweet.

### **Objections To Defendant's Evidence Supporting Its Additional Facts**

#### **Defendant's Fact 42:**

(1) Objection to Hobbs Decl. ¶ 4 on the basis that Mr. Hobbs lacks personal knowledge of the nature and extent of Empire Distribution's use of its purported marks since January 2010. FRE 602.

#### **Defendant's Fact 43:**

(1) Objection to Hobbs Decl. ¶ 5 on the basis that Mr. Hobbs lacks personal knowledge of the nature and extent of Empire Distribution's use of its purported

1 marks since January 2010. FRE 602. Further objection to Hobbs Decl. ¶ 5 on the  
2 basis that it contains an impermissible legal conclusion as to Empire Distribution's  
3 trademark rights. FRE 701.

4  
5 **Defendant's Fact 48:**

6 (1) Objection to Hobbs Decl. ¶¶ 9-10 on the basis that Mr. Hobbs lacks  
7 personal knowledge of the USPTO's reasons for approving the applications for  
8 publication. FRE 602. Further objection to Hobbs Decl. ¶¶ 9-10 on the basis that  
9 the USPTO's approval of the applications for publication (following which there  
10 will be an objection period) is not relevant to the merits of Fox's motion or this  
11 dispute. FRE 401.

12  
13 **Defendant's Fact 50:**

14 (1) Objection to Hobbs Decl. ¶ 13 on the basis that it contains an  
15 impermissible legal conclusion as to the use of the marks that is "protect[ed] and  
16 permit[ted]" based on defendant's trademark applications. FRE 701. Further  
17 objection to Hobbs Decl. ¶ 13 on the basis that defendant's filing of its trademark  
18 applications "without claim to any particular font style, size, design or color" is not  
19 relevant to the merits of Fox's motion or this dispute. FRE 401.

20  
21 **Defendant's Fact 51:**

22 (1) Objection to Hobbs Decl. ¶ 14 on the basis that defendant does not  
23 dispute that at least some of the over 650 registered or pending applications for  
24 "empire" related marks identified by Fox are related to the services and products  
25 offered by defendant and thus whether others of these applications are unrelated to  
26 the services and products offered by defendant is not relevant to the merits of Fox's  
27 motion or this dispute. FRE 401.

28 **Defendant's Fact 52:**

(1) Objection to Hobbs Decl. ¶ 15 on the basis that it contains an impermissible legal conclusion as to the circumstances under which trademarks are “entitled to trademark rights or protection.” FRE 701. Further objection to Hobbs Decl. ¶ 15 on the basis that defendant does not contend that the supporting marks for all of the over 650 registered or pending applications for “empire” related marks identified by Fox are no longer in use and thus whether some of these marks are no longer in use is not relevant to the merits of Fox’s motion or this dispute. FRE 401.

**Defendant’s Fact 53:**

(1) Objection to Hobbs Decl. ¶ 16, Ex. 2 on the basis that whether or not Fox has claimed trademark rights in “Empire” is not relevant to the Court’s First Amendment analysis under *Rogers v. Grimaldi* and thus is not relevant to the merits of Fox’s motion or this dispute. *See Rogers*, 75 F.2d 994, 998 (2d Cir. 1989); FRE 401.

**Defendant’s Fact 54:**

(1) Objection to Hobbs Decl. ¶ 17 on the basis that it contains an impermissible legal conclusion as to Fox’s purported “pattern of filing trademark applications for the names of television programs that it broadcasts...” FRE 701. Further objection to Hobbs Decl. ¶ 17 on the basis that *Fox’s* trademark applications, especially those relating to television programs *other than Empire*, are not relevant to Fox’s motion or this dispute. FRE 401.

**Defendant’s Fact 55:**

(1) Objection to Hobbs Decl. ¶ 18 on the basis that it contains an impermissible legal conclusion as to Fox’s purported “pattern of filing trademark opposition and cancellation actions before the Trademark Trial and Appeal Board (‘TTAB’) of the USPTO arising out of the names of television programs that it



1 broadcasts...” FRE 701. Further objection to Hobbs Decl. ¶ 18 on the basis that  
 2 *Fox’s* trademark opposition and cancellation actions, especially those relating to  
 3 television programs *other than Empire*, are not relevant to Fox’s motion or this  
 4 dispute. FRE 401.

5  
 6 **Defendant’s Fact 56:**

7 (1) Objection to Shami Decl. ¶¶ 6-21 on the basis that it contains improper  
 8 opinion testimony from a lay witness on Empire Distribution’s purported reputation  
 9 and influence. FRE 701. Mr. Shami was not designated as an expert witness by  
 10 defendant, yet he impermissibly provide opinions as to his own company’s  
 11 reputation based on his purported specialized knowledge and experience. *See*  
 12 *Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on “perceptions, education,  
 13 training, and experience of the witness” are expert opinions); *Munchkin*, 2015 WL  
 14 774046, at \*3) (“Lay opinion testimony is not to provide specialized explanations  
 15 or interpretations that an untrained layman could not make if perceiving the same  
 16 acts or events.”) (quoting *Connecticut*, 297 F.3d 548, 554 (7th Cir. 2002)).

17  
 18 **Defendant’s Fact 57:**

19 (1) Objection to Shami Decl. ¶¶ 7, 9-19 on the basis that it contains improper  
 20 opinion testimony from a lay witness concerning the recognition of artists with  
 21 whom Empire Distribution has worked. FRE 701. Mr. Shami was not designated  
 22 as an expert witness by defendant, yet he impermissibly provides opinions  
 23 concerning the recognition of various artists based on his purported specialized  
 24 knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246 (opinions based  
 25 on “perceptions, education, training, and experience of the witness” are expert  
 26 opinions); *Munchkin*, 2015 WL 774046, at \*3 (“Lay opinion testimony is not to  
 27 provide specialized explanations or interpretations that an untrained layman could  
 28 not make if perceiving the same acts or events.”) (quoting *Connecticut*, 297 F.3d at

1 554).

2  
3 **Defendant's Fact 58:**

4 (1) Objection to Shami Decl. ¶¶ 8 on the basis that it contains improper  
5 opinion testimony from a lay witness as to Empire Distribution's role in Kendrick  
6 Lamar's career. FRE 701. Mr. Shami was not designated as an expert witness by  
7 defendant, yet he impermissibly provide conclusory opinions as to his own  
8 company's role with respect to Kendrick Lamar's career based on his purported  
9 specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246  
10 (opinions based on "perceptions, education, training, and experience of the witness"  
11 are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion testimony is  
12 not to provide specialized explanations or interpretations that an untrained layman  
13 could not make if perceiving the same acts or events.") (quoting *Connecticut*, 297  
14 F.3d at 554).

15  
16 **Defendant's Fact 59:**

17 (1) Objection to Shami Decl. ¶ 20 on the basis that Mr. Shami's recitation of  
18 what appears on Spotify's list of the top 100 hip-hop songs of 2015 is an out of  
19 court statement offered to prove the truth of the matter asserted and thus constitutes  
20 impermissible hearsay not subject to any exception. FRE 801, 802.

21  
22 **Defendant's Fact 60:**

23 (1) Objection to Shami Decl. ¶ 20 on the basis that Mr. Shami's recitation of  
24 what appears on Rolling Stone's list of the 40 Best Rap Albums of 2015,  
25 Pitchfork's Best Songs of 2015, and Pigeons & Planes' New Artists for 2016 lists is  
26 an out of court statement offered to prove the truth of the matter asserted and thus  
27 constitutes impermissible hearsay not subject to any exception. FRE 801, 802.

**Defendant's Fact 68:**

(1) Objection to Shami Decl. ¶ 37 on the basis that advertising and publicity campaigns focused on Empire Distribution's *artists*, without reference to Empire Distribution's *marks*, are not relevant to Fox's motion or this dispute. FRE 401.

**Defendant's Fact 69:**

(1) Objection to Shami Decl. ¶ 37 on the basis that amounts spent marketing, advertising, and promoting Empire Distribution's *artists*, without reference to Empire Distribution's *marks*, are not relevant to Fox's motion or this dispute. FRE 401.

**Defendant's Fact 71:**

(1) Objection to Shami Decl. ¶¶ 35-61, McDaniels Decl. ¶¶ 4-8, Douthit Decl. ¶¶ 11-14, and Julien Decl. ¶¶ 7-11 on the basis that they contain improper opinion testimony from lay witnesses on Empire Distribution's purported reputation and influence. FRE 701. None of these individuals were designated as expert witnesses by defendant, yet they impermissibly provide opinions based on their purported specialized knowledge and experience. *See United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997) (opinions based on "perceptions, education, training, and experience of the witness" are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.") (quoting *Connecticut*, 297 F.3d at 554 (7th Cir. 2002)).

**Defendant's Fact 73:**

(1) Objection to Shami Decl. ¶¶ 62-83, McDaniels Decl. ¶¶ 9-14, Douthit Decl. ¶¶ 7-10, and Julien Decl. ¶¶ 12-21 on the basis that they contain improper

1 opinion testimony from lay witnesses on the importance of record labels to  
 2 consumers in the urban music genre. FRE 701. None of these individuals were  
 3 designated as expert witnesses by defendant, yet they impermissibly provide  
 4 opinions based on their purported specialized knowledge and experience. *See*  
 5 *Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on “perceptions, education,  
 6 training, and experience of the witness” are expert opinions); *Munchkin*, 2015 WL  
 7 774046, at \*3 (“Lay opinion testimony is not to provide specialized explanations or  
 8 interpretations that an untrained layman could not make if perceiving the same acts  
 9 or events.”) (quoting *Connecticut*, 297 F.3d at 554).

10 (2) Objection to Bowler Decl. ¶ 8, Ex. 73 (Expert Report of Kristin J. Lieb)  
 11 ¶¶ 3, 12-22, 46 on the basis that the purported expert opinion relies entirely on  
 12 unreliable hearsay statements. FRE 703; *Marcel*, 11 F.3d at 567 n.6 (Experts may  
 13 rely on hearsay “if the data is reliable and qualified under Rule 703.”); *Soden*, 714  
 14 F.2d at 503-06.

15  
 16 **Defendant’s Fact 74:**

17 (1) Objection to Shami Decl. ¶¶ 90, 93 on the basis that its assertion that  
 18 “Empire’s reputation is being seriously damaged by Fox’s unauthorized use of the  
 19 “Empire” name for the Empire Series and Empire Series Music...” is an  
 20 argumentative legal conclusion and conclusory statement. FRE 701; *Hollander v.*  
 21 *American Cyanamid Co.*, 172 F.3d 192,198 (2d. Cir. 1999) (conclusory and  
 22 argumentative statements should be stricken).

23  
 24 **Defendant’s Fact 75:**

25 (1) Objection to Shami Decl. ¶¶ 95-113 on the basis that its assertion that  
 26 “Empire and Fox are competing for the sale of the same type of music to the same  
 27 customers in the same places” is an argumentative legal conclusion and conclusory  
 28 statement. FRE 701; *Hollander*, 172 F.3d at 198 (conclusory and argumentative

statements should be stricken).

**Defendant's Fact 76:**

(1) Objection to Shami Decl. ¶¶ 95-113 on the basis that its assertion that “Empire and Fox are competing for the sale of the same type of music to the same customers in the same places” is an argumentative legal conclusion and conclusory statement. FRE 701; *Hollander*, 172 F.3d at 198 (conclusory and argumentative statements should be stricken).

**Defendant's Fact 77:**

(1) Objection to Shami Decl. ¶¶ 84, 92-94, 100, and 114, McDaniels Decl. ¶¶ 15-17, Douthit Decl. ¶¶ 14, Simon Decl. ¶¶ 2-3 and Julien Decl. ¶¶ 22-24 on the basis that they contain improper opinion testimony from lay witnesses on the likelihood of consumer confusion. FRE 701. None of these individuals were designated as expert witnesses by defendant, yet they impermissibly provide opinions based on their purported specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on “perceptions, education, training, and experience of the witness” are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 (“Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.”) (quoting *Connecticut*, 297 F.3d 548 at 554 ).

**Defendant's Fact 78:**

(1) Objection to Shami Decl. ¶¶ 115-135, McDaniels Decl. ¶¶ 15-17, Douthit Decl. ¶¶ 14, Simon Decl. ¶¶ 2-3 and Julien Decl. ¶¶ 22-26 on the basis that they contain improper opinion testimony from lay witnesses as to the purported existence of “actual” confusion. FRE 701. None of these individuals were designated as expert witnesses by defendant, yet they impermissibly provide

1 opinions based on their purported specialized knowledge and experience. *See*.  
 2 *Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on “perceptions, education,  
 3 training, and experience of the witness” are expert opinions); *Munchkin*, 2015 WL  
 4 774046, at \*3 (“Lay opinion testimony is not to provide specialized explanations or  
 5 interpretations that an untrained layman could not make if perceiving the same acts  
 6 or events.”) (quoting *Connecticut*, 297 F.3d at 554).

7 (2) Objection to Shami Decl. ¶¶ 121, Ex. 10; 124, Ex. 13; 125, Ex. 14 on the  
 8 basis that these pieces of evidence involve out of court statements offered to prove  
 9 the truth of the matter asserted and thus constitute impermissible hearsay not  
 10 subject to any exception. FRE 801, 802.

11 (3) Objection to Julien Decl. ¶¶ 22-26; Douthit Decl. ¶ 14; McDaniels Decl.  
 12 ¶¶ 15-17; Simon Decl. ¶¶ 2-3; Shami Decl. ¶¶ 84; 92-94; 100; 114-118; 119, Ex. 8;  
 13 120, Ex. 9; 121, Ex. 10; 122, Ex. 11; 123, Ex. 12; 124, Ex. 13; 125, Ex. 14; 126,  
 14 Ex. 15; 127, Ex. 16; 128, Ex. 17; 129, Ex. 18; 130, Ex. 19; 131, Ex. 20; 132, Ex.  
 15 21; 133, Ex. 22; 134, Ex. 23; 135, Ex. 24 on the basis that none of the cited  
 16 evidence involves mistaken purchasing decisions and thus is irrelevant to the issue  
 17 of consumer confusion, the merits of Fox’s motion, and this dispute. FRE 401; *see*  
 18 *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005).

19 (4) Objection to Shami Decl. ¶¶ 119, Ex. 8; 129, Ex. 18; 133, Ex. 22; 134,  
 20 Ex. 23; 135, Ex. 24 on the basis that the comments show carelessness or  
 21 inattentiveness, but no indication that the author is confused regarding source, and  
 22 thus are irrelevant to the issue of consumer confusion, the merits of Fox’s motion,  
 23 and this dispute. FRE 401.

24 (5) Objection to Julien Decl. ¶¶ 22-26; Douthit Decl. ¶ 14; McDaniels Decl.  
 25 ¶¶ 15-17; Simon Decl. ¶¶ 2-3; Shami Decl. ¶¶ 84; 92-94; 100; 114-18; 120, Ex. 9;  
 26 121, Ex. 10; 122, Ex. 11; 123, Ex. 12; 124, Ex. 13; 125, Ex. 14; 131, Ex. 20; 132,  
 27 Ex. 21 on the basis that evidence of confusion from or comments and inquiries by  
 28 individuals with pre-existing relationships with the party alleging infringement are

1 irrelevant to the issue of consumer confusion, the merits of Fox's motion, and this  
 2 dispute. FRE 401; *see Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138,  
 3 1147 (9th Cir. 2009).

4 (6) Objection to Shami Decl. ¶ 122, Ex. 11 on the basis that the comment  
 5 shows only that the individual was reminded of defendant, not that the individual  
 6 was confused, and thus is irrelevant to the issue of consumer confusion, the merits  
 7 of Fox's motion, and this dispute. FRE 401; *see M2 Software, Inc. v. Madacy*  
 8 *Entm't*, 421 F.3d 1073, 1083 (9th Cir. 2005). In fact, the individual's inclusion of  
 9 "lol" to his tweet (a fact which Mr. Shami fails to share in his declaration)  
 10 demonstrates that his tweet is a joke and there is no confusion.

11 (7) Objection to Shami Decl. ¶¶ 128, Ex. 17; 130, Ex. 19 on the basis that the  
 12 comments show only that the individual was reminded of *Empire*, not that the  
 13 individual was confused, and thus are irrelevant to the issue of consumer confusion,  
 14 the merits of Fox's motion, and this dispute. FRE 401; *see Madacy*, 421 F.3d at  
 15 1083.

16 (8) Objection to Shami Decl. ¶¶ 131, Ex. 20; 132, Ex. 21; 135, Ex. 24 on the  
 17 basis that the comments show the individual knows the difference between  
 18 defendant and *Empire* and thus are irrelevant to the issue of consumer confusion,  
 19 the merits of Fox's motion, and this dispute. FRE 401. The comment in exhibit 20  
 20 shows that the individual believes defendant, as someone with connections in the  
 21 entertainment industry, could "help get" an audition on *Empire*, not that defendant  
 22 is associated with *Empire*. Use of the word "they" (rather than "you") further  
 23 indicates this individual knows defendant and *Empire* are not associated. The  
 24 comment in exhibit 21 shows the individual knows the difference between  
 25 defendant and *Empire* by confirming his knowledge that "you guys aren't working  
 26 with Empire (the TV show)." The comment in exhibit 24 correctly identifies  
 27 @EMPIRE as a record label and @EmpireFOX as a show, demonstrating no  
 28 confusion.



(10) Objection to Julien Decl. ¶¶ 22-26; Douthit Decl. ¶ 14; McDaniels Decl. ¶¶ 15-17; Shami Decl. ¶¶ 92-94; 100; 114-19 on the basis that the evidence contains impermissible legal conclusions about consumer confusion. FRE 701.

(11) Objection to Julien Decl. ¶¶ 22-26; Shami Decl. ¶¶ 92-94, 100 on the basis that the declarant lacks personal knowledge of these purported facts. FRE 602.

(12) Objection to Julien Decl. ¶¶ 22-26; Shami Decl. ¶ 92-94; 100; 119 on the basis that the declarant's testimony is speculative.

#### **Defendant's Fact 79:**

(1) Objection to Shami Decl. ¶¶ 84, 92-94, 100, and 114-135, McDaniels Decl. ¶¶ 15-17, Douthit Decl. ¶ 14, Simon Decl. ¶¶ 2-3 and Julien Decl. ¶¶ 22-26 on the basis that they contain improper opinion testimony from lay witnesses on the purported existence of consumer confusion. FRE 701. None of these individuals were designated as expert witnesses by defendant, yet they impermissibly provide opinions based on their purported specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on "perceptions, education, training, and experience of the witness" are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.") (quoting *Connecticut*, 297 F.3d at 554).

(2) *See supra* at Defendant's Fact 78, Objections (2)-(12).

#### **Defendant's Fact 80:**

(1) Objection to Shami Decl. ¶¶ 84, 92-94, 100, and 114-135, McDaniels Decl. ¶¶ 15-17, Douthit Decl. ¶ 14, Simon Decl. ¶¶ 2-3 and Julien Decl. ¶¶ 22-26 on the basis that they contain improper opinion testimony from lay witnesses on the purported existence of consumer confusion. FRE 701. None of these individuals

were designated as expert witnesses by defendant, yet they impermissibly provide opinions based on their purported specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on “perceptions, education, training, and experience of the witness” are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 (“Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.”) (quoting *Connecticut*, 297 F.3d at 554).

(2) *See supra* at Defendant’s Fact 78, Objections (2)-(12).

#### **Defendant’s Fact 81:**

(1) Objection to Shami Decl. ¶¶ 84, 92-94, 100, and 114-35, McDaniels Decl. ¶¶ 15-17, Douthit Decl. ¶ 14, Simon Decl. ¶¶ 2-3 and Julien Decl. ¶¶ 22-26 on the basis that they contain improper opinion testimony from lay witnesses on the purported existence of consumer confusion. FRE 701. None of these individuals were designated as expert witnesses by defendant, yet they impermissibly provide opinions based on their purported specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on “perceptions, education, training, and experience of the witness” are expert opinions); *Munchkin, Inc.* 2015 WL 774046, at \*3 (“Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.”) (quoting *Connecticut*, 297 F.3d at 554).

(2) *See supra* at Defendant’s Fact 78, Objections (2)-(12).

#### **Defendant’s Fact 82:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69, Ross Decl. ¶ 3, and Bywater Decl. ¶ 3 on the basis that whether or not Fox has used the “Empire” name as a “source-identifier” outside of the construct of the *Empire* series is not relevant to the merits of Fox’s motion or this dispute. FRE 401. Defendant’s opposition cites no law to

1 support its attempt to create a new “source-identifier” exception to the First  
2 Amendment protection for expressive works under *Rogers v. Grimaldi*, 875 F.2d  
3 994 (2nd Cir. 1989). *See* Opp. at 4-9.

4  
5 **Defendant’s Fact 83:**

6 (1) Objection to Shami Decl. ¶¶ 136-41 on the basis that Mr. Shami’s  
7 appearance on one episode of a reality television show, participation in the  
8 production of music videos that have appeared on television, and vague plans to  
9 have Empire Distribution’s artists appear on television is not relevant to the merits  
10 of Fox’s motion or this dispute. FRE 401.

11  
12 **Defendant’s Fact 86:**

13 (1) Objection that this purported “fact” is mere argument, in violation of the  
14 Court’s Scheduling Order (Dkt. No. 23).

15  
16 **Defendant’s Fact 87:**

17 (1) Objection that this purported “fact” is mere argument, in violation of the  
18 Court’s Scheduling Order (Dkt. No. 23).

19  
20 **Defendant’s Fact 88:**

21 (1) Objection that this purported “fact” is mere argument, in violation of the  
22 Court’s Scheduling Order (Dkt. No. 23).

23  
24 **Defendant’s Fact 90:**

25 (1) Objection that this purported “fact” is mere argument, in violation of the  
26 Court’s Scheduling Order (Dkt. No. 23).

**Defendant's Fact 91:**

(1) Objection that this purported "fact" is mere argument, in violation of the Court's Scheduling Order (Dkt. No. 23).

**Defendant's Fact 92:**

(1) Objection that this purported "fact" is mere argument, in violation of the Court's Scheduling Order (Dkt. No. 23).

**Defendant's Fact 93:**

(1) Objection that this purported "fact" is mere argument, in violation of the Court's Scheduling Order (Dkt. No. 23).

**Defendant's Fact 94:**

(1) Objection to Shami Decl. ¶¶ 62-83, McDaniels Decl. ¶¶ 9-14, Douthit Decl. ¶¶ 7-10, and Julien Decl. ¶¶ 12-21 on the basis that they contain improper opinion testimony from lay witnesses on the importance of record labels to consumers of rap, hip hop, and R&B music. FRE 701. None of these individuals were designated as expert witnesses by defendant, yet they impermissibly provide opinions based on their purported specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on "perceptions, education, training, and experience of the witness" are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 ("Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.") (quoting *Connecticut*, 297 F.3d at 554 ).

(2) Objection to Bowler Decl. ¶ 8, Ex. 73 (Expert Report of Kristin J. Lieb) ¶¶ 3, 12-22, 46 on the basis that the purported expert opinion relies entirely on unreliable hearsay statements. FRE 703; *Marcel*, 11 F.3d at 567 n.6 (Experts may rely on hearsay "if the data is reliable and qualified under Rule 703."); *Soden*, 714

1 F.2d at 503-06.

2  
3 **Defendant's Fact 95:**

4 (1) Objection to Shami Decl. ¶¶ 6-21, 35-61, McDaniels Decl. ¶¶ 4-8,  
5 Douthit Decl. ¶¶ 11-14, and Julien Decl. ¶¶ 7-11 on the basis that they contain  
6 improper opinion testimony from lay witnesses on Empire Distribution's purported  
7 reputation and influence. FRE 701. None of these individuals were designated as  
8 expert witnesses by defendant, yet they impermissibly provide opinions based on  
9 their purported specialized knowledge and experience. *See Figueroa-Lopez*, 125  
10 F.3d at 1246 (opinions based on "perceptions, education, training, and experience  
11 of the witness" are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 ("Lay  
12 opinion testimony is not to provide specialized explanations or interpretations that  
13 an untrained layman could not make if perceiving the same acts or events.")  
14 (quoting *Connecticut*, 297 F.3d at 554).

15 (2) Objection to Bowler Decl. ¶ 8, Ex. 73 (Expert Report of Kristin J. Lieb)  
16 ¶¶ 3, 22-33, 47 on the basis that the purported expert opinion relies on unreliable  
17 hearsay statements. FRE 703; *Marcel*, 11 F.3d at 567 n.6 (Experts may rely on  
18 hearsay "if the data is reliable and qualified under Rule 703."); *Soden*, 714 F.2d at  
19 503-06.

20  
21 **Defendant's Fact 97:**

22 (1) Objection to Shami Decl. ¶¶ 92-94, and 100, McDaniels Decl. ¶¶ 15-17,  
23 Douthit Decl. ¶¶ 14, and Julien Decl. ¶¶ 22-24 on the basis that they contain  
24 improper opinion testimony from lay witnesses on the likelihood of consumer  
25 confusion. FRE 701. None of these individuals were designated as expert  
26 witnesses by defendant, yet they impermissibly provide opinions based on their  
27 purported specialized knowledge and experience. *See Figueroa-Lopez*, 125 F.3d at  
28 1246 (opinions based on "perceptions, education, training, and experience of the

witness” are expert opinions); *Munchkin*, 2015 WL 774046, at \*3 (“Lay opinion testimony is not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.”) (quoting *Connecticut*, 297 F.3d at 554).

(2) Objection to Bowler Decl. ¶ 8, Ex. 73 (Expert Report of Kristin J. Lieb) ¶¶ 3, 34-45, 48 on the basis that the purported expert opinion relies on unreliable hearsay statements. FRE 703; *Marcel*, 11 F.3d at 567 n.6 (Experts may rely on hearsay “if the data is reliable and qualified under Rule 703.”); *Soden*, 714 F.2d at 503-06.

#### **Defendant’s Fact 98:**

(1) Objection to Villar Decl. ¶ 2, Ex. 25, on the basis that the fact that Fox identified six individuals in its Initial Disclosures pursuant to Fed. R. Civ. P. 26(a)(1) is not relevant to the merits of Fox’s motion or this dispute. FRE 401.

#### **Defendant’s Fact 99:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69 at 32:12-22, on the basis that the fact that Ms. Ryan’s position at FBC and interactions with Mr. Bywater are not relevant to the merits of Fox’s motion or this dispute. FRE 401.

#### **Defendant’s Fact 100:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69, 45:23-47:1, 47:4, on the basis that Mr. Bywater’s lack of knowledge as to the selection of the name “Empire” for Fox’s television series is not relevant to the merits of Fox’s motion or this dispute. FRE 401.

#### **Defendant’s Fact 101:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69, 49:13-15, 49:19, on the basis that

1 Mr. Bywater's lack of knowledge as to whether Fox conducted any trademark  
2 searches prior to adopting the name "Empire" for Fox's television series is not  
3 relevant to the merits of Fox's motion or this dispute. FRE 401.

4  
5 **Defendant's Fact 102:**

6 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 150:3-9, on the basis that Mr.  
7 Bywater's lack of knowledge as to how much the network spent marketing *Empire*  
8 and the fact that Shannon Ryan probably would know is not relevant to the merits  
9 of Fox's motion or this dispute. FRE 401.

10  
11 **Defendant's Fact 103:**

12 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 165:23-166:5, 166:11-15, on the  
13 basis that Mr. Bywater's testimony that marketing would know more about the  
14 reports on the downloads to date of music released from the second season of  
15 *Empire* is not relevant to the merits of Fox's motion or this dispute. FRE 401.

16  
17 **Defendant's Fact 104:**

18 (1) Objection to Villar Decl. ¶ 3 on the basis that Mr. Villar lacks personal  
19 knowledge as to which individuals *Fox* believes have discoverable information.  
20 FRE 602. Further objection to Villar Decl. ¶ 3 on the basis that Mr. Villar's  
21 assessment of who Fox included on Fox's Initial Disclosures is not relevant to the  
22 merits of Fox's motion or this dispute. FRE 401.

23  
24 **Defendant's Fact 105:**

25 (1) Objection to Villar Decl. ¶ 3 on the basis that Mr. Villar lacks personal  
26 knowledge as to who Fox's attorneys of record are, FRE 602, and, indeed, Ms.  
27 Reynolds is not one of Fox's attorneys of record.



**Defendant's Fact 106:**

(1) Objection to Villar Decl. ¶ 3 on the basis that the percentage of percipient witnesses who submitted declarations in support of Fox's motion and were not disclosed in Fox's Initial Disclosures is not relevant to the merits of Fox's motion or this dispute. FRE 401. Moreover, to the extent defendant claims this is relevant, defendant's opposition to Fox's motion contained declarations from five percipient witnesses (Ghazi Shami, Ari Simon, Robb McDaniels, Thuy-An Julien, and Patrick Denard Douthit), and only *one* of them (Ghazi Shami) was listed in defendant's Initial Disclosures.

**Defendant's Fact 107:**

(1) Objection to Villar Decl. ¶ 4 on the basis that whether or not Fox had supplemented its Initial Disclosures as of the date defendant's opposition was due is not relevant to the merits of Fox's motion or this dispute. FRE 401. Moreover, to the extent defendant claims this is relevant, defendant likewise has not supplemented or amended its Initial Disclosures to date.

**Defendant's Fact 108:**

(1) Objection to Villar Decl. ¶ 7 on the basis that the date of Fox's initial document production is not relevant to the merits of Fox's motion or this dispute. FRE 401.

**Defendant's Fact 109:**

(1) Objection to Villar Decl. ¶ 11 on the basis that the date of the document productions of *third parties* Fox Music, Lee Daniels, and Danny Strong is not relevant to the merits of Fox's motion or this dispute. FRE 401.

**Defendant's Fact 110:**

(1) Objection to Villar Decl. ¶ 20 on the basis that, under the circumstances, the number of percipient witnesses Fox has made available for deposition to date is not relevant to the merits of Fox's motion or this dispute. FRE 401. As an initial matter, Fox closed for the holidays from December 24 through January 4, so Fox's witnesses were unavailable during this period. More importantly, defendant stipulated to the parties' summary judgment briefing schedule without indicating it would need to depose any Fox witnesses, let alone a specific number, prior to the date its opposition was due.

**Defendant's Fact 111:**

(1) Objection to Villar Decl. ¶ 25 on the basis that, under the circumstances, the fact that Fox had not provided confirmed dates for expert witnesses Ted Cohen and Erich Joachimsthaler is not relevant to the merits of Fox's motion or this dispute. FRE 401. As an initial matter, defendant stipulated to the parties' summary judgment briefing schedule without indicating it would need to depose or have confirmed dates for any expert witnesses, let alone Mr. Cohen and Mr. Joachimsthaler specifically, prior to the date its opposition was due. Moreover, understanding that not all depositions would be completed prior to summary judgment briefing, defendant identified certain "priority" witnesses it wanted to depose first, schedule permitting. Neither Mr. Cohen nor Mr. Joachimsthaler were among these "priority" witnesses. Finally, contrary to Mr. Villar's representations, Mr. Cohen's report is cited once in Fox's motion and Mr. Joachimsthaler's report is not cited in Fox's motion at all, further reinforcing the lack of relevance of defendant's purported fact.

**Defendant's Fact 112:**

(1) Objection to Villar Decl. ¶¶ 2-34 on the basis that Mr. Villar's declaration

1 presents improper legal arguments as to Empire Distribution's purported inability to  
2 oppose Fox's motion for summary judgment. FRE 701. Further objection to Villar  
3 Decl. ¶¶ 2-34 on the basis that, under the circumstances, the discovery defendant  
4 has requested from Fox is not relevant to the merits of Fox's motion or this dispute.  
5 Defendant stipulated to the parties' summary judgment briefing schedule without  
6 indicating it required any specific pieces of discovery prior to the date its opposition  
7 was due. Moreover, Fox produced documents on these topics nearly one month  
8 before defendant's opposition was due.

9  
10 **Defendant's Fact 113:**

11 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 15:22, 16:3-7, on the basis that  
12 whether or not Fox "once owned a record label" that "did not succeed" is not  
13 relevant to the merits of Fox's motion or this dispute. FRE 401.

14  
15 **Defendant's Fact 114:**

16 (1) Objection to Bowler Decl. ¶ 4, 15:8-17:2, 17:6-19:9, 19:11-24, 20:2-5,  
17 and 21:16-22:2, on the basis that Mr. Bywater's work on soundtracks for films and  
18 music for television shows prior to obtaining his current position is not relevant to  
19 the merits of Fox's motion or this dispute. FRE 401.

20  
21 **Defendant's Fact 115:**

22 (1) Objection to Bowler Decl. ¶ 4, 18:22-19:9 and 19:11-17, on the basis that  
23 the existence of separate departments for film music and television music at Fox is  
24 not relevant to the merits of Fox's motion or this dispute. FRE 401.

25  
26 **Defendant's Fact 118:**

27 (1) Objection to Bowler Decl. ¶ 4, Ex. 69 at 24:14-25:5, on the basis that  
28 defendant's citation to Mr. Bywater's testimony about deals for *Glee* is not relevant

1 to the merits of Fox's motion or this dispute. FRE 401.

2  
3 **Defendant's Fact 121:**

4 (1) Objection to Bowler Decl. ¶ 4, Ex. 69 at 26:24-25, 27:4-8, 27:11, 27:16-  
5 17, on the basis that defendant's counsel asked Mr. Bywater to make an  
6 impermissible legal conclusion as to Fox's rights. FRE 701.

7  
8 **Defendant's Fact 124:**

9 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 34:9-10, 34:13-14, on the basis  
10 that the similarities between *Glee* and *Empire* are not relevant to this dispute. FRE  
11 401.

12  
13 **Defendant's Fact 125:**

14 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 34:16-22, on the basis that *Glee*'s  
15 "super great" use of music and similarities to *Empire* are not relevant to this  
16 dispute. FRE 401.

17  
18 **Defendant's Fact 126:**

19 (1) Objection to Bowler Decl. ¶ 4, Ex. 69 at 34:23-35:1, on the basis that the  
20 release of series music for *Glee* is not relevant to the merits of Fox's motion or this  
21 dispute. FRE 401.

22  
23 **Defendant's Fact 127:**

24 (1) Objection to Bowler Decl. ¶ 4, Ex. 69 at 36:6-11, on the basis that  
25 defendant's counsel asked Mr. Bywater to make a comparison between *Empire* and  
26 *Glee*, which is not relevant to the merits of Fox's motion or this dispute. FRE 401.

**Defendant's Fact 131:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69 at Exs. 3, 4, on the basis that these articles are out of court statements offered to prove the truth of the matter asserted and thus constitute impermissible hearsay not subject to any exception. FRE 801, 802.

**Defendant's Fact 144:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69, 89:10-25, 90:1, 90:8-14, 91:2-3, 91:6-7, 91:10-17, 92:4-7, 92:10-19, and 93:1-11, on the basis that Mr. Bywater lacks personal knowledge of the details of the story line with respect to Snoop Dogg's appearance on *Empire*. FRE 602. Further objection to Bywater Ex. 7 on the basis that the statements regarding Snoop Dogg's appearance on *Empire* are out of court statements offered to prove the truth of the matter asserted and thus constitute impermissible hearsay not subject to any exception. FRE 801, 802.

**Defendant's Fact 147:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69, 83:25-84:7, 84:11-21, and Bywater Ex. 6 on the basis that the quotes statements are out of court statements offered to prove the truth of the matter asserted and thus constitute impermissible hearsay not subject to any exception. FRE 801, 802.

**Defendant's Fact 149:**

(1) Objection to Bowler Decl. ¶ 4, Ex. 69, 104:13-22, 105:7-22, and Bywater Ex. 8 on the basis that whether Fox *contemplated* a digital-only release of the *Empire* soundtrack is not relevant to the merits of Fox's motion or this dispute. FRE 401. Further objection to Bywater Ex. 8 on the basis that the statements regarding the possibility of a digital-only release are out of court statements offered to prove the truth of the matter asserted and thus constitute impermissible hearsay

1 not subject to any exception. FRE 801, 802.

2  
3 **Defendant's Fact 157:**

4 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 161:18-25, 162:9-12, and Bywater  
5 Ex. 17 on the basis that whether Fox receives Soundscan sales reports from  
6 Columbia is not relevant to the merits of Fox's motion or this dispute. FRE 401.

7  
8 **Defendant's Fact 160:**

9 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 85:3-10, 85:14-17, on the basis  
10 that the fact that Mr. Bywater's comparison of *Glee* and *Empire* is not relevant to  
11 the merits of Fox's motion or this dispute. FRE 401.

12  
13 **Defendant's Fact 163:**

14 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 86:12-14, 86:17-24, 87:3-11, on  
15 the basis that Fox's *consideration* of a tour with the actors from *Empire* is not  
16 relevant to the merits of Fox's motion or this dispute. FRE 401.

17  
18 **Defendant's Fact 164:**

19 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 189:16-190:7, 190:10-12, on the  
20 basis that Mr. Bywater lacks personal knowledge of any purported promotion by  
21 Fox at the South by Southwest festival. FRE 602. Further objection to Bowler  
22 Decl. ¶ 4, Ex. 69, 189:16-190:7, 190:10-12 and Bywater Ex. 24 on the basis that  
23 whether Fox sent a bus wrap with unknown content to the South by Southwest  
24 festival is not relevant to the merits of Fox's motion or this dispute. FRE 401.

25  
26 **Defendant's Fact 165:**

27 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 196:11-197:6, on the basis that  
28 whether a Pepsi commercial was written into *Empire*'s storyline is not relevant to

1 the merits of Fox's motion or this dispute. FRE 401. Objection to Bywater Ex. 27  
2 on the basis that the statements regarding potential sponsorships and partnerships  
3 are out of court statements offered to prove the truth of the matter asserted and thus  
4 constitute impermissible hearsay not subject to any exception. FRE 801, 802.

5  
6 **Defendant's Fact 166:**

7 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 200:10-11, 200:18-201:5, on the  
8 basis that Mr. Bywater has no personal knowledge of whether an *Empire* promo for  
9 the song "No Apologies" aired at the BET Hip-Hop Awards. FRE 602. Further  
10 objection to Bowler Decl. ¶ 4, Ex. 69, 200:10-11, 200:18-201:5 and Bywater Ex. 29  
11 on the basis that whether cast members from *Empire* have performed at BET  
12 awards shows is not relevant to the merits of Fox's motion or this dispute. FRE  
13 401. Further objection to Bywater Ex. 29 on the basis that the statements regarding  
14 the use of "No Apologies" for an *Empire* promotion to air on the BET awards are  
15 out of court statements offered to prove the truth of the matter asserted and thus  
16 constitutes impermissible hearsay not subject to any exception. FRE 801, 802.

17  
18 **Defendant's Fact 168:**

19 (1) Objection to Bowler Decl. ¶ 4, Ex. 69, 208:3-6 209:15-24, 210:4-5,  
20 210:8-14, and Bywater Ex. 30 on the basis that Mr. Bywater lacks personal  
21 knowledge of the intended meaning of Mr. Melnick's statements. FRE 602.  
22 Further objection to Mr. Melnick's statements in Bywater Ex. 30 on the basis that  
23 they are out of court statements offered to prove the truth of the matter asserted and  
24 thus constitute impermissible hearsay not subject to any exception. FRE 801, 802.

25  
26 **Defendant's Fact 169:**

27 (1) Objection to Shami Decl. ¶¶ 7 on the basis that it contains improper  
28 opinion testimony from a lay witness as to the recognition of artists with whom



1 Empire Distribution has worked. FRE 701. Mr. Shami was not designated as an  
 2 expert witness by defendant, yet he impermissibly provides opinions as to the  
 3 caliber of various artists based on his purported specialized knowledge and  
 4 experience. *See Figueroa-Lopez*, 125 F.3d at 1246 (opinions based on  
 5 “perceptions, education, training, and experience of the witness” are expert  
 6 opinions); *Munchkin*, 2015 WL 774046, at \*3 (“Lay opinion testimony is not to  
 7 provide specialized explanations or interpretations that an untrained layman could  
 8 not make if perceiving the same acts or events.”) (*Connecticut*, 297 F.3d at 554).

9 (2) Objections to Bowler Decl. ¶ 4, Ex. 69, 202:1-205:3 on the basis that Mr.  
 10 Bywater’s familiarity with certain artists is not relevant to the merits of Fox’s  
 11 motion or this dispute.

12  
 13 **Defendant’s Fact 170:**

14 (1) Objection to Bowler Decl. ¶¶ 10-11 on the basis that it contains an  
 15 impermissible legal conclusion unsupported that is contradicted by the facts. FRE  
 16 701. Indeed, defendant’s counsel told Fox that its counterclaims pled forward  
 17 confusion. Lens Decl. ¶ 7.

18  
 19 **Defendant’s Fact 171:**

20 (1) Objection to Bowler Decl. ¶¶ 10-11 (paragraph 12 does not exist) on the  
 21 basis that Mr. Bowler lacks personal knowledge as to whether Fox was aware of  
 22 Empire Distribution’s forward and reverse confusion claims. FRE 602. Indeed,  
 23 Fox’s evidence shows that it was *not* aware that Empire Distribution intended to  
 24 assert a reverse confusion claim. Lens Decl. ¶ 7.

1  
2 Dated: January 15, 2016

DANIEL M. PETROCELLI  
MOLLY M. LENS  
CAMERON H. BISCAY  
O'MELVENY & MYERS LLP

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5 By: /s/ Daniel M. Petrocelli  
6 Daniel M. Petrocelli

7  
8 Attorneys for Twentieth Century Fox  
9 Television, a division of Twentieth  
10 Century Fox Film Corporation, and  
11 Fox Broadcasting Company  
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